Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-987

ROY W. WEATHERS,

Petitioner,

—v.—

PAUL EBERT, Commonwealth Attorney
of Prince William County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

ROY W. WEATHERS,

Petitioner,

-v-

PAUL EBERT, Commonwealth
Attorney of Prince William County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered on November 13, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, which has not yet been reported, is set forth in the Appendix, infra., p.1 . The order of the District Court for the Eastern District of Virginia dismissing defendant Ebert, which has not been reported, is set forth in the Appendix, infra., p. 10a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on November 13, 1974. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a prosecutor, who is charged with intentionally procuring a second indictment against a person who was acquitted on an identical indictment two weeks earlier, is absolutely immune from a suit for money damage brought under 42 U.S.C. §1983.

STATUTE INVOLVED

42 U.S.C. §1983 provides:

Every person who, under color of

any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On June 1, 1970, the Grand Jury of Prince William County returned an indictment charging petitioner Weathers with commission of a felony. On July 23, 1970, petitioner Weathers was acquitted of the felony by the Circuit Court of Prince William County. Less than two weeks later, on August 3, 1970, the Grand Jury of Prince William County returned a second indictment, identical to the first, charging petitioner Weathers with commission of the same felony. App., infra., p. 6a.

Some two and a half years later, on February 25, 1973, petitioner Weathers was arrested at his home by two police officers pursuant to a bench warrant based upon the second grand jury indictment. The police officers searched the petitioner , assaulted him, removed him from his home, and caused him to be imprisoned in the Prince William

County jail for approximately twenty-four hours. App., infra., p. 8a. On May 10, 1973, petitioner Weathers was brought to trial, at which time the Circuit Court granted the prosecutor's nolle prosequi motion and dismissed the indictment. App., infra., pp. 6a-7a.

Thereafter, on October 1, 1973, petitioner Weathers filed a complaint in the United States District Court below seeking damages under 42 U.S.C. §1983 against prosecutor Ebert and three police officers. In that complaint, Weathers alleged the facts set forth above and charged that prosecutor Ebert had procured the second indictment despite the fact that he "knew or should have known that the same grand jury had on June 1, 1970, returned indictment 3778 for the identical offense, on which indictment the plaintiff was acquitted on July 3, 1970." App., infra., p. 6a. Petitioner Weathers charged that prosecutor Ebert's actions violated his constitutional right "not to be put twice in jeopardy of life or limb." App., infra., p. 6a. Weathers also charged that each of the defendants had "acted wilfully, knowingly, and purposefully with the specific intent to deprive Plaintiff of his right to: a) Freedom from illegal seizure of his person, papers, and effects; b) Freedom from unlawful arrest; c) Freedom from illegal detention and imprisonment; d) Freedom from physical abuse, coercion and intimidation." App., infra., p. 8a.

On November 14, 1973, prosecutor Ebert

filed a motion to dismiss the complaint as to him on the grounds that he was "immune from prosecution for lawful acts arising out of his duty as Commonwealth Attorney." After oral argument on the motion, but without an evidentiary hearing as to the scope of the prosecutor's discretion, the specific responsibilities of the office, or as to all of the circumstances as they reasonably appeared at the time of the actions on which liability was sought, District Judge Albert V. Bryan, Jr., granted Ebert's motion. App., infra., p. 10a.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal of prosecutor Ebert on the ground that a prosecutor is absolutely immune from any damage action arising out of acts undertaken in his prosecutorial role.

REASONS FOR GRANTING THE WRIT

The Court of Appeals below conferred absolute immunity upon a prosecutor who was alleged to have intentionally violated petitioner's constitutional rights. That decision stands directly in conflict with Hilliard v. Williams, 465 F.2d 1212 (6th Cir.), cert. denied, 409 U.S. 1029 (1972), which rejected absolute immunity for prosecutors, and with last Term's decision in Scheuer v. Rhodes, 416 U.S. 232 (1974), rejecting absolute immunity for officers of the executive branch of government.

While this Court has not specifically ruled on the scope of prosecutorial immunity in §1983 damage actions, the Court has carefully distinguished between the absolute immunity available to members of the legislative and judicial branches of government, and the qualified immunity applicable to officials of the executive branch. In Tenney v. Brandhove, 341 U.S. 367 (1951), the Court held that principles of common law immunity applied to legislators, thereby absolutely barring §1983 suits for money damages against them for actions taken within their official capacities. And in Pierson v. Ray, 386 U.S. 547 (1967), the Court similarly applied common law immunity to judges acting in their official capacities.

Such immunity, however, has been expressly denied to members of the executive branch of government. In Scheuer v. Rhodes, the immunity available to "the other two branches" was distinguished, 416 U.S. at 241; the "existence of an absolute 'executive immunity'" was rejected, 416 U.S. at 238; and only a qualified immunity "in varying scope" was recognized as "available to officers of the executive branch of government," 416 U.S. at 247. The Court unanimously held that the application of the "qualified immunity" could not be determined upon a barren record on a motion to dismiss, but rather that it was "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U.S. at 247.

In the instant case, the Court of Appeals affirmed the dismissal of prosecuting attorney Ebert without an evidentiary hearing, despite petitioner's specific allegation that Ebert intentionally procured an indictment against him which was identical to one upon which petitioner had been acquitted two weeks earlier. In affirming the dismissal of Ebert, the Court of Appeals relied on a series of pre-Scheuer cases upholding absolute prosecutorial immunity;[1/] attempted to distinguish two pre-Scheuer decisions denying prosecutorial immunity in §1983 damage actions where intentional constitutional deprivations had been alleged;[2/] and conveniently disposed of Scheuer by citing it as "dictum," App., infra, pp. 2a - 3a.

1/ Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973); Madison v. Gerstein, 440 F.2d 338 (5th Cir. 1971); Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1968); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966); Phillips v. Nash, 311 F. 2d 513 (7th Cir. 1962). See also the post-Scheuer decision of Imbler v. Pachtman, 500 F.2d 1301 (9th Cir. 1974). But see, Imbler v. Pachtman, 500 F.2d 1301, 1304 (9th Cir. 1974) (Kilkenny, J. dissenting).

2/ Those two cases, Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), cert. denied, 414 U.S. 1143 (1974) and Hilliard v. Williams, 465 F.2d 1212 (6th Cir.) cert. denied, 409 U.S. 1029 (1972), are discussed infra, at p. 10 - 14.

In Scheuer, the Court pointed out again that:

> "[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 416 U.S. at 236.

In the instant case, petitioner alleged in his complaint that prosecuting attorney Ebert, and other executive officials, intentionally violated his constitutional rights:

> "11. On or about the 3rd day of August, 1970, . . . Ebert acting individually and on behalf of . . . The State of Virginia . . . presented to the Grand Jury of Prince William County, indictment number 3836, which was returned a true bill, in spite of the fact that [he] knew or should have known that the same grand jury had on June 1, 1970, returned indictment 3778 for the identical offense, on which indictment the plaintiff was acquitted on July 23, 1970. . . .
>
> "12. As a direct result of the action of defendants in securing a second indictment of plaintiff for an offense for which he had previously been acquitted and in

> subsequently arresting plaintiff on that indictment, defendants violated plaintiff's right under the Fifth Amendment . . . not to be put twice in jeopardy of life or limb."

The complaint also alleges that in February, 1973, Weathers was arrested on the second indictment without a valid warrant and was imprisoned in the county jail for more than twenty-four hours. It further alleges:

> "14. In addition each of the defendants, separately and in concert, acted outside the scope of his jurisdiction and without authorization of law . . . wilfully, knowingly, and purposefully with the specific intent to deprive plaintiff of his right to:
>
> a) Freedom from illegal seizure of his person, papers and effects;
>
> b) Freedom from unlawful arrest;
>
> c) Freedom from illegal detention and imprisonment;
>
> d) Freedom from physical abuse, coercion, and intimidation." App., infra, p. 8a .

"Fairly read," this complaint alleges that defendant Ebert, "in undertaking such actions, acted either outside the scope of his . . . office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful

power of office." 416 U.S. at 235. Under Scheuer, petitioner's claim against Ebert cannot be dismissed without an evidentiary assessment of the numerous variables applicable to the "qualified immunity [which] is available to officers of the executive branch." 416 U.S. at 247.

Even without regard to Scheuer, the Fourth Circuit's extension of an absolute immunity for an allegedly intentional deprivation of constitutional rights conflicts with the decisions of four different Courts of Appeals which have denied immunity to prosecutors who have exceeded the scope of their office.

In Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), cert. denied, 414 U.S. 1143 (1974), the Seventh Circuit held that prosecutor Berbling would not be immune in a §1983 damage action if he had exceeded the authority of his office, and remanded the case to allow the plaintiffs to amend their complaint to include such allegations.[3/]

3/ The Court below attempted to distinguish Littleton, citing it as vacated and remanded on other grounds sub nom., Spomer v. Littleton, 414 U.S. 514 (1974), on the grounds that it was concerned with immunity in the context of equitable relief.

The Fourth Circuit's confusion here is somewhat understandable as there were three separate defense appeals from Littleton. First, as to equitable relief against the substituted prosecutor, the Court in Spomer remanded for a determination of mootness. Second, as to equitable relief against the judicial defendants, the Court in O'Shea v. Littleton, 414 U.S. 488 (1974), held there was no case or controversy under Article III of the Constitution. Third, as to the availability of damages against prosecutor Berbling, his petition for certiorari was denied as untimely filed, 414 U.S. 1143 (1974). The disposition of this latter petition led the Court in Spomer to note that "[n]o question concerning damage relief is involved in the case presently before us" 414 U.S. at 518-519. n. 5.

In Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965), the Ninth Circuit held that a prosecutor who allegedly had supervised activities directed toward obtaining a coerced confession had exceeded the scope of his office and hence the scope of his immunity. In Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955), the Fifth Circuit held that a prosecutor who allegedly had coerced a guilty plea had acted outside the scope of his authority and thus could not shelter himself with a claim of immunity. The courts in each of these three cases conceded, however, that immunity was available to the extent that the prosecutor had acted within his "quasi-judicial" functions. In their view, immunity was inapplicable only

where the prosecutor had acted in an investigatory or police role.

This distinction, however, was firmly rejected in Hilliard v. Williams, 465 F.2d 1212 (6th Cir.), cert. denied, 409 U.S. 1029 (1972), a pre-Scheuer case in direct conflict with the instant case. In Hilliard, the Sixth Circuit recognized that the acts complained of were undertaken in the course of the prosecutor's quasi-judicial functions, but the Court refused immunity: "We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant." 465 F.2d at 1218.4/

Admittedly, the weight of pre-Scheuer, lower court authority is contrary to Littleton, Robichaud, Lewis and Hilliard.5/ But

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4/ Dissenting in the post-Scheuer case of Imbler v. Pachtman, 500 F.2d 1301, 1304-1306 (9th Cir. 1974), Judge Kilkenny agreed with Hilliard and noted that, in light of Scheuer, it was "time to recognize that prosecutors are not entirely above the law which holds other individuals financially accountable for intentional misdeeds." 500 F.2d at 1306 (emphasis in original).

5/ See cases cited in note 2, supra. See also cases cited in Littleton v. Berbling, 468 F.2d 389, 409, n. 43 (7th Cir. 1972).

where an intentional deprivation of constitutional rights is alleged against a member of the executive branch and a defense of immunity is asserted, Scheuer commands an evidentiary determination of the scope of the official's discretion, of the responsibilities of the office, and of all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. 416 U.S. at 247.

Precisely because "the immunity is not absolute but rather is one that is qualified or limited, an executive officer may or may not be subject to liability depending on all the circumstances that may be revealed by evidence." 416 U.S. at 239. Since an evidentiary hearing is necessary, the plaintiff is "entitled to be heard more fully than is possible on a motion to dismiss a complaint." 416 U.S. at 250.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1975

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1231

ROY W. WEATHERS, Appellant

-v-

PAUL EBERT, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA. Albert V. Bryan, Jr., District Judge.

(Argued July 24, 1974. Decided November 13, 1974)

Before: CRAVEN, BUTZNER, and FIELD, Circuit Judges.

James R. Tate (Duvall, Tate, Bywater and Davidson brief) for appellant; Robert C. Coleburn (Benjamin Margolin; Simmonds, Coleburn, Towner and Carman on brief) for appellee.

BUTZNER, Circuit Judge:

Roy Weathers appeals from the dismissal of his suit under 42 U.S.C. §1983 against Paul Ebert, Commonwealth's Attorney for Prince William County, Virginia, for failure to state a claim on which relief can be granted. According to Weathers' amended complaint, Ebert, three local police officers, and other defendants conspired to deprive him of his constitutional rights by having him indicted, arrested, and brought to trial on a charge of which he had previously been acquitted. The district court held that Ebert was immune from suit, and we affirm.

I

The Supreme Court has not had occasion to rule on the immunity of prosecuting attorneys from liability for damages. It has held, though, that the common law immunity of legislators and judges from liability for their official acts applies in suits under 42 U.S.C. §1983. Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). Relying on these precedents and on the common law, a number of courts have held that prosecuting attorneys are immune from civil suits for damages based on the performance of duties that are part of the judicial process. E.g., Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1969); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966); Phillips v. Nash, 311 F.2d 513 (7th Cir. 1962). But see Imbler v. Pachtman, 500 F.2d 1301, 1304 (9th Cir. 1974)(Kilkenny , J. dissenting); Scheuer v.

Rhodes, ____U.S.____,____(1974)(dictum).

As we noted in McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972), the public interest in forthright enforcement of the criminal law is best served when a state's attorney can freely decide when to prosecute, uninfluenced by the potential burden of retaliatory suits. Although that burden cannot be eliminated so long as the courts are open, it is most effectively minimized by a doctrine which allows suits to be dismissed on the basis of the complaint without exploring the underlying facts. For this reason, most courts afford the state's attorney immunity from any civil action connected with his prosecuting function. E.g., Imbler v. Pachtman, 500 F.2d 1301 (9th Cir. 1974); Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973); Madison v. Gerstein, 440 F.2d 338 (5th Cir. 1971); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966). Traditional concepts of immunity, then, require the dismissal of Weathers' suit.

Nevertheless, Weathers urges that two recent cases support his claim. The first, Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), vacated and remanded on other grounds sub nom., Spomer v. Littleton, 414 U.S. 514 (1974), held that immunity does not bar a suit for equitable relief designed to prevent future violations of §1983 by a prosecutor. The court, however, granted immunity with respect to monetary damages. Since Weathers does not seek an injunction, Littleton is inapplicable.

The second case, Hilliard v. Williams, 465 F.2d 1214 (6th Cir. 1972), denied immunity to a prosecutor charged with the deliberate suppression of an FBI laboratory report that established the innocence of the defendant. The court reasoned that since a prosecutor's duty is to protect the innocent as well as to convict the guilty, his discretion does not extend to seeking the conviction of a person he knows to be innocent.[1]

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1. The court quoted with approval the following passage from the ABA Code of Professional Responsibility:

"DR-7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

"(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

"(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." 465 F.2d at 1218.

Accordingly, it held that the district court erred in dismissing the complaint.

Hilliard represents a real, but very limited, departure from the traditional rule of prosecutorial immunity. The complaint charged an intentional abuse of the prosecuting function which resulted in a denial of due process.[2] It supported this charge, with specific averments of the evidence concealed by the prosecutor, its exculpatory effect, and the deceitful means he used. Under the principles expressed in Hilliard, a complaint such as Weathers' could not be dismissed on the ground of immunity if it alleged facts showing that a prosecutor had intentionally placed the plaintiff in double jeopardy. We need not decide, however, whether to follow that case, for the complaint in this one does not meet its standards.

Weathers' complaint charges that Ebert "knew or should have known" that Weathers had been acquitted previously of the identi-

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2. Contra, Imbler v. Pachtman, 500 F.2d 1301 (9th Cir. 1974), in which a prosecutor was held immune from suit on a claim that he had knowingly presented perjured testimony at trial. Accord, Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970).

cal offense.[3] These allegations are too broad. If immunity were denied, Ebert would be burdened by defending not only against a a claim of intentional abuse of his authority but also against claims that he negligently overlooked the existence of the first acquittal or mistook its legal effect.

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3. Weathers alleged:

"11. On or about the 3rd day of August, 1970, ... Ebert acting individually and on behalf of ... The State of Virginia ... presented to the Grand Jury of Prince William County, indictment number 3836, which was returned a true bill, in spite of the fact that [he] knew or should have known that the same grand jury had on June 1, 1970, returned indictment 3778 for the identical offense, on which indictment the plaintiff was acquitted on July 23, 1970. . . .

"12. As a direct result of the action of defendants in securing a second indictment of plaintiff for an offense for which he had previously been acquitted and in subsequently arresting plaintiff on that indictment, defendants violated plaintiff's right under the Fifth Amendment ... not to be put twice in jeopardy of life or limb.

"13. On May 10, 1973, plaintiff was brought to trial ... on the second indictment, number 3836, at which time the attorney for The State of Virginia moved the Court to nolle prosequi the indictment which motion was

(Footnote 3 continued next page)

Moreover, the complaint alleges no facts which would support a finding of intent instead of negligent or innocent mistake. Its bare charges of malice are no substitutes for specific averments, for "the immunity doctrine would be of little value if such characterization . . . could force the prosecutor to stand trial." Hampton v. Chicago, 484 F.3d 602, 608 (7th Cir. 1973); cf. Snowden v. Hughes, 321 U.S. 1, 10 (1944). Since the facts set forth in this complaint do not approach the specific allegations of deliberate malfeasance which led the court in Hilliard to depart from the traditional rule of immunity, that case is inapplicable.

II

We also conclude that the complaint does not state a claim against Ebert for Weathers' arrest and detention. Making an arrest is a police function, not a judicial one, and Ebert would lack immunity if he were involved. Hampton v. Chicago, 484 F.2d 602 (7th Cir. 1973); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955); cf. Pierson v. Ray, 386 U.S. 547 (1967). Assuming, for the purpose of this decision, that the complaint alleges a viola-

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(Footnote 3 continued)

objected to by counsel for the defendant. The Circuit Court granted the motion . . . and the indictment was dismissed."

tion of Weathers' constitutional rights by the police,[4] it does not connect Ebert with the arrest. His procurement of the second indictment is the single specific allegation against him, and we concluded in part I that this was insufficient. The other allegations are only general statements that he acted in concert with others.[5] These, unsupported by

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4. Since this suit is still pending against the other defendants, we express no opinion as to the sufficiency of Weathers' claims against them.

5. The complaint states that in February, 1973, two local policemen, named as defendants, arrested Weathers on the second indictment without a valid warrant and took him to the county jail, where he was imprisoned for twenty-four hours. It further alleges:

> "14. In addition each of the defendants, separately and in concert, acted outside the scope of his jurisdiction and without authorization of law . . . wilfully, knowingly, and purposefully with the specific intent to deprive plaintiff of his right to:
>
> a) Freedom from illegal seizure of his person, papers, and effects;
>
> b) Freedom from unlawful arrest;
>
> c) Freedom from illegal detention and imprisonment
>
> d) Freedom from physical abuse, coercion, and intimidation."

(Footnote 5 continued)

averments of communication, consultation, cooperation, or command, do not make him responsible under §1983 for the acts of others. Compare Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2nd Cir. 1964) with Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955).

The judgment is affirmed.

(Footnote 5 continued)

We assume, of course, that Ebert is included among the defendants mentioned in this paragraph.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ROY W. WEATHERS, Plaintiff,	)	
vs.	)	Civil Action No. 436-73
C. P. LYLES, ET AL, Defendants.	)	

ORDER
(Filed January 4, 1974)

THIS CAUSE came on this 4th day of January, 1974, to be heard upon the motion to dismiss of the defendant, Paul Ebert, and was argued by counsel; and

It appearing to the Court that said motion should be granted,

It is hereby ORDERED that the complaint filed herein by the plaintiff against the defendant, Paul Ebert, be, and the same hereby is dismissed.

/s/ A. V. Bryan, Jr.
United States District Judge

Entered: January 4th, 1974

Seen and Objected to:
/s/ D. E. Bywater
Counsel for Plaintiff

I ask for this:
/s/ Robt. C. Coleburn
Robert C. Coleburn
Counsel for Defendant, Paul Ebert

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1231

Roy W. Weathers,	Appellant,
vs.	
Paul Ebert, Commonwealth Attorney, Prince William County, Individually and as Commonwealth Attorney, Prince William County,	Appellee,
C. P. Lyles, Manassas Police Dept., individually and as a member of the Town of Manassas Police Dept.; John Burdine, individually and as a member of Prince William County Police Dept.; William Welch, individually and as a member of Prince William County Police Dept.; Harry T. Parrish, as Mayor on behalf of the Town of Manassas; C. Scott Winfield, as Chairman of the Board of Supervisors on behalf of Prince William County; Town of Manassas,	Defendants.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED
NOV 13 1974
WILLIAM K. SLATE, II
CLERK

William K. Slate II
CLERK

A True Copy, T e s t e:
William K. Slate, II, Clerk
By
Deputy Clerk

Supreme Court, U. S.
FILED
MAR 5 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-987

ROY W. WEATHERS,

Petitioner,

v.

PAUL EBERT, Commonwealth Attorney of Prince William County,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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March 5, 1975

ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-6837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-987

ROY W. WEATHERS,

Petitioner,

v.

PAUL EBERT, Commonwealth Attorney of Prince William County,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Paul Ebert, Commonwealth Attorney of Prince William County, Virginia, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 505 F.2d 514.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *Neither the decision below nor the record raises the Question Presented in the petition.*

The sole Question Presented in the petition (p. 2) is whether a state prosecutor is "absolutely immune" from a money damage suit under 42 U.S.C. §1983, where the prosecutor

> " . . . is charged with intentionally procuring a second indictment against a person who was acquitted on an identical indictment two weeks earlier . . ."

But the Fourth Circuit did not decide that question in this proceeding. Moreover, the facts of record will not support a determination of that question by this Court.

(1) In Part I of its opinion (Pet. 2a-7a),[1] the Fourth Circuit merely held that petitioner's complaint, as filed in the District Court, was (a) "too broad" with respect to its allegations of intentional abuse of authority, and (b) devoid of sufficient allegations of deliberate malfeasance. Because the complaint was found deficient in these respects, the Fourth Circuit did not reach the question whether and to what extent an immunity clothed the actions of the respondent prosecutor. The question which petitioner puts to this Court cannot be extracted from the opinion below.

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[1] Part II of the opinion (Pet. 7a-9a) dealt with the inadequacy of the claim against the respondent prosecutor for the petitioner's allegedly illegal arrest and detention. That claim is not raised in the petition and is not encompassed by the Question Presented.

(2) The facts of record, moreover, do not permit the formulation or the resolution of the Question Presented by the petitioner. The essence of that question is whether the respondent prosecutor is "absolutely immune" from a §1983 claim when it is alleged that he knowingly violated petitioner's constitutional right to be free from double jeopardy; such jeopardy is said to arise from the prosecutor's act of securing a second indictment following an acquittal "on an identical indictment." But the record will not support such a question or its allegations:

(a) To begin with, the indictments secured by the respondent prosecutor were not identical. The two indictments, which were submitted by the petitioner to the Fourth Circuit,[2] on their face show significant differences as to the charged offenses and the dates thereof, to wit:

No. 3778	No. 3836
The first indictment charged that "on or about the 27th day of April, 1970, in the County aforesaid, one ROY WILLARD WEATHERS did unlawfully and feloniously take, steal and drive away one 1966 Chevrolet Impalla automobile, bearing Virginia License No. 214-639, having a value in excess of $100.00, the same being the property of James Hamm." After a non-jury trial, the petitioner was acquitted of this offense on July 23, 1970.	The second indictment alleged that "on the 29th day of April, 1970, in the County aforesaid, one ROY W. WEATHERS did unlawfully and feloniously take, steal and carry away personal property having a value in excess of $100.00, the same being the property of James Hamm." This indictment was obtained on August 3, 1970. On May 10, 1973, the Circuit Court approved the prosecutor's decision to nolle prosequi this indictment.

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[2] The petitioner presented the two indictments in full in the appendix (A. 7-A.9) of his Fourth Circuit brief, and presumably asked that court to take judicial notice of the indictments. The differences between the indictments were brought to the attention of the Fourth Circuit both in respondent's brief (pp. 2-3) and in respondent's oral argument.

Thus petitioner was indicted for distinct offenses patently committed on different days.

(b) The record in this case, including petitioner's complaint below, is barren of any indication that the petitioner at any time raised a double jeopardy objection or defense to the second indictment, or that the second indictment was nolle prosequied on double jeopardy grounds. The order of the Circuit Court of Prince William County, dated May 10, 1973, supplied by the petitioner for the Fourth Circuit's convenience, states:

> "This day came the Attorney for the Commonwealth in open court and with the consent of the Court, saith that he will not prosecute further on behalf of the Commonwealth against the said Roy W. Weathers, and a nolle prosequi is hearby entered accordingly with objection of the defendant and his counsel. And the defendant is released as to this charge."

(c) While petitioner's complaint alleged (par. 13) that he "was brought to trial . . . on the second indictment, number 3836," on the day when the nolle prosequi was entered, the aforesaid court order indicates that the nolle prosequi was entered immediately after "the Court Reporter was sworn," but before any jury was empanelled or any witness was sworn. Thus no jeopardy could have attached with respect to this second indictment, it being the law of Virginia, as elsewhere, that "the danger of conviction or jeopardy of an accused begins when the [non-jury] trial has reached the stage where the Commonwealth begins to introduce its testimony" or at the stage of "the swearing of the jury when the accused is tried by jury." *Rosser v. Commonwealth*, 159 Va. 1028, 1036.

Thus missing from this case is the essential factual predicate of the Question Presented — *i.e.*, allegations or facts demonstrating that petitioner's constitutional protection against double jeopardy was somehow violated by the prosecutor's actions. No kind of evidentiary hearing can fill the void created by the facts and allegations already supplied by the petitioner. Compare *Imbler v. Pachtman*, 500 F.2d 1301, 1302 (9th Cir. 1974), certiorari granted (No. 74-5435, February 24, 1975), where the essential factual predicate to the issue as to the extent of a prosecutor's immunity — the alleged knowing use of perjured testimony to secure conviction — was amply alleged and buttressed by judicial findings.[3]

Without some assurance from the record, including the allegations in the complaint, that petitioner was in fact put in double jeopardy by the prosecutor's actions, the Question Presented is left hanging from a hypothetical situation. In the context of this record, which conclusively shows that the petitioner was never put in double jeopardy, the Question Presented in the petition could be resolved only by rendering an impermissible advisory opinion.

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[3] Likewise, in *Hilliard v. Williams*, 465 F.2d 1212, 1213-1214 (6th Cir. 1972), certiorari denied, 409 U.S. 1029 (1972), a case much relied upon by petitioner, there were judicial findings supporting the factual predicate of the immunity question, i.e., the allegation that the prosecutor had deliberately suppressed an FBI report establishing the defendant's innocence.

2. *Absent a ruling by the Fourth Circuit as to the extent of a prosecutor's immunity, no reason exists for the for the grant of certiorari.*

As has been made evident herein, the Fourth Circuit did not, in the words of the petition (p. 5), confer "absolute immunity upon a prosecutor who was alleged to have intentionally violated petitioner's constitutional rights." That court, in Part I of its opinion, simply held that the averments in the complaint were too broad or otherwise too inadequate to warrant consideration of whether the prosecutor's traditional immunity should be lifted in this instance.[4] Being a decision limited to the unique pleading matters here present, it does not qualify for review by this Court.

It follows that the claimed conflict (Pet., p. 5) with *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972), cert. denied, 409 U.S. 1029 (1972), and with *Scheuer v. Rhodes*, 416 U.S. 232 (1974), does not and cannot exist. The Fourth Circuit did not disagree with the Sixth Circuit's *Hilliard* ruling; it found that case to be "inapplicable" since the "facts set forth in this complaint do not approach the specific allegations of deliberate malfeasance which led

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[4] The petitioner seeks to buttress his allegations concerning the double jeopardy matter by referring (Pet., p. 9) to assertions in another part of the complaint concerning the alleged concert of action in securing an illegal arrest and confinement of the petitioner. But the latter element, dealt with in Part II of the opinion below, is in no way related to the adequacy of the double jeopardy allegations.

the court in *Hilliard* to depart from the traditional rule of immunity" (Pet. 7a).

And this Court's ruling in the *Scheuer* case, which dealt only with the extent of the executive immunity, in no way conflicts with the failure of the Fourth Circuit to remand this case for an evidentiary hearing. This Court ordered such a hearing in *Scheuer*, 416 U.S. at 250, only because the documents "properly before the District Court at this early pleading stage specifically placed in issue" whether the executive officers were acting within the scope of their duties and were acting in good faith, in the light of the demonstrated events on the Kent State campus. But here the pleadings and documents put before the Fourth Circuit clearly show that petitioner's double jeopardy rights were not and could not have been violated. An evidentiary hearing would only serve to underscore that self-evident fact. And it would be equally useless to remand this case to shore up the generalized assertions of abuse of authority or malfeasance that become viable only if the prosecutor did in fact place the petitioner in double jeopardy.

Finally, this Court's recent action in granting certiorari in *Imbler v. Pachtman*, No. 74-5435 (February 24, 1975), does not add to the reviewability of this case. Nor does it warrant a holding of this petition until the *Imbler* case is argued and decided next Term. Whatever this Court may hold in *Imbler* as to the scope of the prosecutor's immunity, the ruling can have no impact on the correctness or reviewability of the decision below. To repeat, the Fourth Circuit has not found it necessary here to delineate, expand or contract the prosecutor's traditional immunity. The faulty pleadings and the inhospitable record made such action inappropriate.

The petitioner has sought to ascribe to the Fourth Circuit the view that the prosecutor's immunity is "absolute." But that court has never adopted that notion. In a decision understandably not cited in the petition, *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972), the Fourth Circuit has recognized that absolute immunity does not extend to prosecuting attorneys when acting outside their judicial or quasi-judicial discretion. The instant case is not to the contrary, for the matter was not put in issue. It affords no opportunity whatever to explore the Fourth Circuit's views in that regard.

This is a simple case of faulty pleading and of a record that fails to sustain any alleged invasion of petitioner's constitutional rights. Its very uniqueness precludes review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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